No. 238

In the Supreme Court of the United States

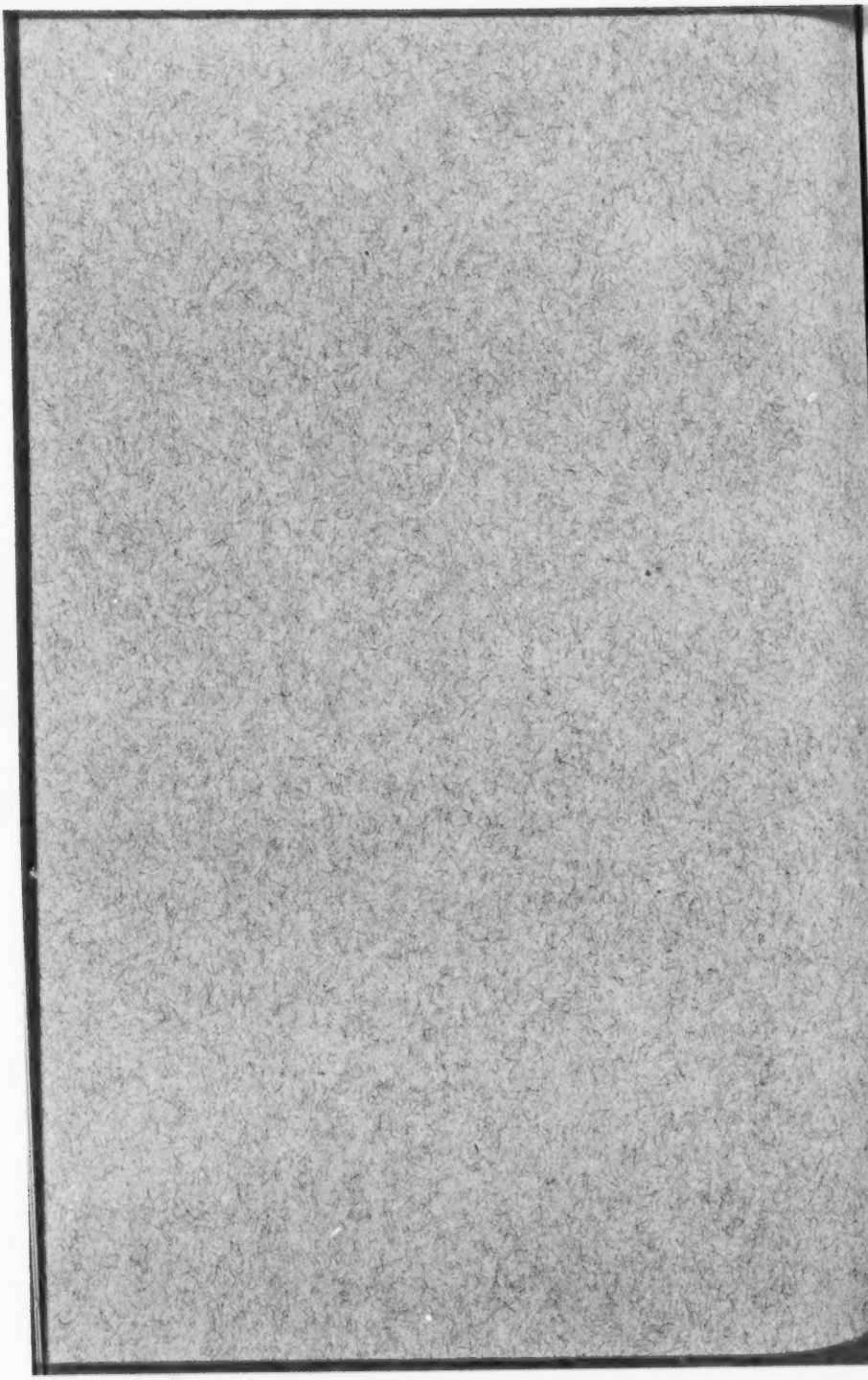
OCTOBER TERM, 1944

SELDON R. GLENN, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

ELEANOR BEARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT



INDEX

CITATIONS

597867—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 238

SELDON R. GLENN, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

ELEANOR BEARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of Seldon R. Glenn, Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit, entered in the above cause on March 20, 1944, affirming the decision of the District Court of the United States for the Western District of Kentucky.

OPINIONS BELOW

The opinion of the district court (Conclusions of Law, R. 109–111) is not reported. The opinion of the circuit court of appeals (R. 115–117) is reported in 141 F. 2d 376.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 20, 1944. (R. 117.) An order extending the time within which to apply for a writ of certiorari until July 7, 1944, was entered on June 16, 1944. (R. 118.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question for decision is whether certain persons engaged in performing needlework in their homes for the taxpayer were her employees within the meaning of Section 907 (c) of the Social Security Act and Section 1607 (c) of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 23–26.

STATEMENT

Respondent brought this action for refund of taxes levied and collected by petitioner under Title IX of the Social Security Act and subchapter (c) of chapter 9 of the Internal Revenue Code, for the years 1938 and 1939. The tax was levied with respect to amounts paid by respondent to homeworkers, and the sole issue was whether those homeworkers were employees of respondent

within the meaning of the taxing provisions. (R. 102–103.)

The facts pertinent to the question here involved, as found by the trial court, are substantially as follows (R. 103–109):

The taxpayer, Eleanor Beard, at the times herein involved, and since 1921, conducted a business of producing and selling comforters, quilts, and similar articles which were made by hand by various individuals engaged by her. Her principal studio for the production of these goods was at Hardinsburg, Breckinridge County, Kentucky. The persons who were engaged in the production of these articles were, in part, from twelve to eighteen of them, those who worked in the studio and, in part, those who did their work at their own homes. (R. 103.)

The taxpayer's methods were as follows: A design for an article was determined upon by the taxpayer which was stamped upon the material to be used and specifications dealing with the work to be performed were decided upon. The article was then taken to the receiving room where material and thread were wrapped with it. The specifications or instructions were placed upon a work ticket attached to the bundle. The bundle was then delivered to a homeworker who wished to do the work and who took the bundle from the studio to her home. The taxpayer furnished no tools, or needles, to the homeworker,

who was required to furnish her own frame, needle, thimble, and any home-made stand for supporting or suspending the article. (R. 103.) At the time of the delivery of the bundle to the homeworker the following contract, with blanks filled in to meet the facts in the case, was signed by both the homeworker and the taxpayer (R. 104):

HARDINSBURG, KENTUCKY, _____ 19____.

WORK CONTRACT

THIS AGREEMENT, made and entered into in duplicate, on the above written day between _____, herein called First Party, and ELEANOR BEARD, herein called Second Party.

WITNESSETH THAT:—

First Party herewith acknowledges that she has this day received from Second Party the following materials:

First Party agrees to work same according to specifications given by Second Party, which specifications are attached hereto and made a part hereof as fully and to the same extent as if copied herein at length, and upon the completion of the work required in said specifications and not later than _____ days from the date hereof, to return said materials to Second Party.

Second Party agrees that said work may be done at such times within the period hereinabove allowed and at such places as are agreeable to First Party, and further

that First Party may do said work either personally or by agents of her own selection.

Upon First Party's completing the specified work upon said materials to the satisfaction of Second Party and redelivering to Second Party the completed work and all unused portions of said materials Second Party agrees to pay First Party for said work a total price of $----------.

From the time of the delivery of said materials by Second Party to First Party, and until the redelivery of said materials to Second Party, First Party shall be liable for the loss or ruin of, or damage or injury to, said materials.

IN TESTIMONY WHEREOF witness the signature of the parties hereunto affixed the day and year first hereinabove written.

----------First Party.

By----------Second Party.

ELEANOR BEARD.

Original.

A signed copy of the contract was given to the homeworker and a signed copy retained by the taxpayer. This written contract was first used by the taxpayer some time in the summer of 1936 but merely put in writing the form of contract that had been orally entered into prior to that time by the taxpayer and the homeworkers in the production of these goods. The price to be paid for the completed article was originally fixed by the homeworker and if, in the opinion of the

homeworker, it developed that it was not enough, the homeworker discussed the matter with the taxpayer and a price was agreed upon satisfactory to both parties. Thereafter, prices were fixed by comparison with the prices previously paid for similar work, with more difficult designs getting higher prices and with adjustments being made with the homeworker when the work proved more difficult than had been expected. (R. 105.)

No designing was done by the homeworker, who was required to follow strictly the design and specifications furnished to her. If the price eventually fixed by the taxpayer for a certain article was not satisfactory to the homeworker, the homeworker did not take that particular piece of work but took such work as carried a price which was satisfactory to her. Each homeworker more or less controlled the time in which the work was to be completed by an estimate made at the time when the work was received of the number of days constituting a reasonable time for the completion of that kind of work. When the work on the particular article was completed by the homeworker it was returned by her to the studio where it was inspected to see if it complied with the specifications and if the work was satisfactory. If the article passed this inspection, the homeworker's vouchers were approved and handed to the check writer who paid the

homeworker the amounts specified in the contract. The completed article was then sent to the shipping room where it was cleaned if necessary and packed and shipped. (R. 105.)

If the inspection showed that the work had not been completed according to the specifications or with acceptable workmanship, it was not approved and payment was withheld. The homeworker was offered an opportunity to do it over but usually did not do so and, accordingly, receive no compensation. In those cases, it was usually completed by someone in the studio. The articles so completed are highly artistic and sell to the luxury trade. (R. 105–106.)

There were over one thousand women doing such home work for the taxpayer and other competing businesses in the three or four counties in that part of Kentucky. In 1938 and 1939, approximately 300 homeworkers did work for the taxpayer but, in other seasons which were not so busy, the number dropped to 200 or 150. From 25% to 30% of these homeworkers had been doing the work for ten years. Contact by the taxpayer with the homeworkers was sometimes made by advertising the fact that work was available for homeworkers and sometimes by asking homeworkers to tell others that such work was available if they desired to do it. (R. 106.)

The homeworkers were usually the wives and daughters of farmers living on farms which were

59.7867—44——2

within a radius of from 20 to 25 miles of the studio. These women had their usual farm duties to perform. Accordingly, such a homeworker did not work steadily throughout the year and would not accept the work at certain periods when her farm duties did not leave time to do such work. These homeworkers did the work at odd times when they were not otherwise employed in their farm duties and at night after the evening meal. The busy season for the taxpayer was from September 15th to December 15th, at which time farm work was comparatively slack. (R. 106.)

There were some half dozen or more companies engaged in the same type of work as the taxpayer in the same general locality in Kentucky who were competitors with each other and with the taxpayer. All of them used homeworkers in more or less the same general way. Some of the homeworkers who did work for the taxpayer would upon the completion of a job for the taxpayer take work from one of taxpayer's competitors instead of taking work from the taxpayer and at times a homeworker would have work from the taxpayer's studio and a competing studio in her home at the same time. (R. 106–107.)

There was no requirement on the part of the taxpayer that a homeworker should work exclusively for her, either over any stated period of time or during any period of time when she was working for the taxpayer. There was no re-

quirement that homeworkers take and complete any certain amount of work, the amount being taken by a homeworker being determined by what she was willing to take and wanted to take and could be returned in a reasonable time. It was not necessary for a homeworker to call in person at the studio to get the work and one homeworker would frequently go to the studio and get bundles for both herself and other homeworkers living in the same general locality to whom she would distribute the bundles. The homeworker who received a bundle at the studio signed the contract in her own name and was responsible for the return of the work according to the agreement with the studio. In many instances, the studio did not know and was never advised as to which homeworker actually received the different bundles and performed the work. (R. 107.)

In some instances, the work was sent to homeworkers by mail. In order for a homeworker to take work from the studio to her home, it was first necessary that she qualify as to workmanship. The homeworkers did no work at the studio and spent no time at the studio except in receiving and returning the work. (R. 107.) There was no requirement by the studio that the particular worker who received the bundle and signed the contract for the work do all of the work under that contract but it was permissible, and it frequently happened, that one member of the family

who received the bundle would pass it around to other members of the family for work by them at such times as they wished to do such work and had the time available in which to do it. This practice was extended between the neighbors. (R. 107–108.) Any division of compensation between the receiving homeworker and the contributing homeworkers was a matter entirely between the homeworkers with which the taxpayer had no connection and about which the latter usually knew nothing. (R. 108.)

The taxpayer did not exercise any control or supervision over the homeworkers or over the work while it was being done. It was left entirely to the judgment and wishes of each homeworker as to the number of days in any week or month that she would devote to the work and as to the number of hours in any day which she would devote to the work. No employee of the studio or of the taxpayer visited the homeworker to inspect the progress or quality of the work while it was being done or to supervise the actual doing of the work. The taxpayer retained and exercised the right to judge whether or not the work when completed by the homeworker and returned to the studio complied with the design and specifications and if the work was of satisfactory quality and to refuse to accept as performance under the contract the returned article unless it did satisfactorily meet those require-

ments. The studio looked exclusively to the finished article when it was returned in determining whether or not the homeworker's contract had been performed and the contract price was payable. (R. 108–109.)

The studio had no right to withdraw the work from a homeworker while it was being worked upon and within the time limit provided by the contract. Both the studio and the homeworker had the right, and exercised it, either to enter into another contract for a succeeding piece of work when one bundle was finished and returned, or to decline to give or take another piece of work. Each piece of work was handled as a separate and distinct contract between the studio and the homeworker. (R. 109.)

Upon these findings the district court held that the homeworkers were not employees of the taxpayer. The circuit court of appeals affirmed, holding that the common-law test of control was determinative and had not been met.

SPECIFICATION OF ERRORS TO BE URGED

1. The circuit court of appeals erred in holding that the homeworkers engaged in performing services in the taxpayer's business were independent contractors and not employees within the meaning of the Social Security Act and corresponding provisions of the Internal Revenue Code.

2. The circuit court of appeals erred in failing to hold that the taxpayer was liable for social security taxes based upon the wages paid to her homeworkers.

3. The circuit court of appeals erred in affirming the judgment of the district court.

REASONS FOR GRANTING THE WRIT

1. The dicision below involves an important question of federal law which has not been passed upon by this Court.

The question whether a person is an employee of another, within the meaning of the Social Security Act, is fundamental in the application of the statute and its importance overshadows all other questions in the administration of the Act. The legal concept of the employment relationship, for purposes of the Act, is the subject of widespread litigation, and clarification by this Court would be in the public interest.

There are now pending in the federal courts over sixty suits in which the substantial question turns on the meaning of the term "employee" as used in the Act. The majority of these cases involve situations where the employment is continuous—though subject to instant termination—but the services are performed away from the premises of the employer and the compensation is on a production basis. Some examples besides homeworkers are: Outside salesmen, abstract digesters, wood cutters and haulers, "coal hustlers,"

taxicab drivers, roofers, fishermen, and truck drivers. Many more potential cases are now in the administrative stage before the Treasury Department and the Social Security Board.[1] In relation to industrial homeworkers alone, the problem is of substantial proportions.[2]

The present case arises under Title IX of the Act, dealing with the unemployment compensation tax. Decisions interpreting the definitions of employment thereunder are of persuasive in-

---

[1] The Treasury Department advises that, although its records are not so kept as to show the facts on which claims for refund are based, of the 5,000 pending claims for refund, abatement or credit, it is estimated that 2,000 claims turn upon the question of whether persons are employees or independent contractors. Of the approximately 5,900 claims disallowed during the year 1943, it is estimated 2,500 were based on the same contention. The estimates made by the Treasury Department do not reflect the extent of the problem as it relates to assessments, delinquencies, and field investigations resulting from the uncertainty as to the meaning of the term "employee" as used in the Act.

The Social Security Board advises that, in administering the benefit provisions of the Act, it had determined prior to December 31, 1943, about 42,500 cases involving a question of the employer-employee relationship. There are now pending about 2,600 such cases, of which 1,700 are "outside salesman" cases, as to which an authoritative decision in the present case would have a distinct bearing.

[2] It has been estimated that in 1935 there were 77,000 homes in which commercialized homework was being done. U. S. Dept. of Labor, Women's Bureau, Bulletin No. 135, p. 15. Fragmentary figures indicate that in the quilting and candlewick bedspread industry there are between 9,000 and 10,000 workers employed by commercial concerns in the manufacture of such articles. *Id.*, Bulletin No. 128; p. 40.

fluence upon the states in administering and interpreting definitions of employment in state unemployment compensation statutes. See, *e. g.*, *Commercial Motor Freight, Inc.* v. *Ebright*, 143 Ohio State 127, 138.[3] Moreover, the definition of employment in Title IX is the same (save for certain differences in exemptions not here material) as that in Titles II and VIII, dealing, respectively, with old age benefit payments and the federal old age benefit tax. The interrelation of the taxing and benefit provisions, the importance of tax returns in furnishing wage records to the Social Security Board, and the binding effect given to those records by the statute, give the decision below an unusual importance from the standpoint of the Government, the taxpayers, and potential claimants of benefits.[4] Because of these factors it

[3] The court there said:

"* * * If, under the circumstances of this case, the federal courts should hold that the federal act does not apply to the situation here presented on the ground that the owner-operators were not employees of the appellant, this court would feel disposed to follow the holdings of the federal courts on this question. It would be anomalous and discriminatory to require an employer to pay the state unemployment assessments and not enjoy the corresponding benefits of the federal act."

[4] The definitions are found in Sections 209 (b) of the Act, as amended by Section 201 of the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360, 1373, and Sections 1426 (b) and 1607 (c) of the Internal Revenue Code, as amended by Sections 601 and 614 of the Amendments of 1939, c. 666, 53 Stat. 1384, 1393. If the decision below becomes final, taxes will not be collected from this, or similar, employers located in the Sixth Circuit. No individual wage records will be available for posting by the Social Security

is believed that irremediable prejudice would result if an endeavor to secure review by this Court of the question here involved were deferred.

2. In holding that "the Act took over the term 'employee' as the common law knew it" (R. 116),

---

Board, since these are secured from the tax returns. Without evidence of wage payments the Board cannot allow benefit payments upon employee retirement. Section 205 (c) of the Act, as added by Section 201 of the Amendments of 1939, 53 Stat. 1369. The Board would be obliged either to seek wage records from such employers or from each of the employees in question, or to disallow benefit claims in this Circuit while allowing them elsewhere. Even if the Board were to accept the first decision rendered as controlling nationally, the benefit claimants would not be precluded from raising the issue. Cf. *Carroll* v. *Social Security Board*, 128 F. (2d) 876, 881 (C. C. A. 7); *Walker* v. *Altmeyer*, 137 F. (2d) 531 (C. C. A. 2). The Board would then be obliged to pass upon claims where wage records would be only partially available. Finally, the statute would bar claims for benefits where they were made more than 4 years after the wages were alleged to have been paid and where the records of the Board did not disclose such wage payments. Section 205 (c), as added by Section 201 of the Amendments of 1939, 53 Stat. 1369, provides in part:

"(2) After the expiration of the fourth calendar year following any year in which wages were paid or are alleged to have been paid an individual, the records of the Board as to the wages of such individual for such year and the periods of payment shall be conclusive for the purposes of this title, except as hereafter provided.

* * * * *

"(4) After the expiration of such fourth year, the Board may revise any entry or include in its records any omitted item of wages to conform its records with tax returns or portions of tax returns (including information returns and other written statements) filed with the Commissioner of Internal Revenue under title VIII of the Social Security Act or the Federal Insurance Contributions Act or under regulations made under authority thereof. * * *"

the court below adopted, it is submitted, an erroneous view of the coverage of the statute.

We think the court erred in premising its decision on the proposition that the common law gave to the term some all-embracing meaning which applied regardless of the nature of the ultimate question involved.[5] What the court did, in fact, was to attribute to the term, as its common law meaning, the so-called "control test" which is commonly, but not always, applied to distinguish an "employee" from an "independent contractor" for purposes of vicarious liability in tort. *National Labor Relations Board* v. *Hearst Publications,* Nos. 336–339, last term, decided by this Court April 24, 1944; Restatement of the Law of Agency, Sec. 220. Assuming, however, that the term "employee" has a single and precise meaning at common law, we believe that the court erred in applying the common law limitations to this statute and in failing to interpret the term, as used here, in the light of the purposes of the Act.

This Court and others have recognized that "employee" is a word which "is not treated by

[5] In speaking of "the term 'employee' as the common law knew it," we assume that the court was referring to the common law meaning of the term "servant." While the term "employee" may not have been unknown to the common law, the English cases do not indicate that it was in frequent usage in those courts. Its development appears to have been contemporaneous with the development of modern employment relationships with all of their complexities of arrangement. Cf. *Cudahy Co.* v. *Parramore*, 263 U. S. 418, 423.

Congress as a word of art having a definite meaning." *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 545, n. 29. Rather, "it takes color from its surroundings" (*id.* at 545) and derives meaning from the context of the statute, "which must be read in the light of the mischief to be corrected and the end to be attained." *South Chicago Co.* v. *Bassett,* 309 U. S. 251, 259; Cf. *Drivers' Union* v. *Lake Valley Co.,* 311 U. S. 91; *National Labor Relations Board* v. *Hearst Publications, supra,* Cf. *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, 597. To put it another way, "the word 'employed' * * * must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. * * * Such statutes * * * should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them." *Lehigh Valley Coal Co.* v. *Yensavage,* 218 Fed. 547, 552–553, certiorari denied, 235 U. S. 705. This the court below did not do.

When the history of the Act is examined it is clear that, with enumerated exceptions, it was designed to provide against the distress of unemployment in old age, as well as during the working life of one whose livelihood is earned in the service of another's business. S. Rep. No. 628, 74th Cong., 1st sess., pp. 2, 9–16; H. Rep. No. 615,

74th Cong., 1st sess., pp. 5–8, 16. *General Wayne Inn* v. *Rothensies,* 47 F. Supp. 391 (E. D. Pa.); *Stone* v. *United States* (E. D. Pa.), decided September 16, 1943 (P-H Unemployment Insurance Service, Vol. 1, par. 36,281); *Willard Sugar Co.* v. *Gentsch* (N. D. Ohio), decided March 3, 1944 (C. C. H. Unemployment Insurance Service, Vol. 1, par. 9106). Cf. *Helvering* v. *Davis,* 301 U. S. 619, 641. Such purposes will not be achieved if the statute be limited by the considerations which bear upon the question whether one who hires another is responsible in tort for his wrong doing. Cf. *National Labor Relations Board* v. *Hearst Publications, supra.* Where individuals are engaged to devote their manual labor to the business of another for wages, differences in their place of labor and in the degree of supervision over them should not be controlling in passing on the question of employment for purposes of a statute having as its end economic protection in old age and in periods of unemployment. In providing for such protection and for the sharing of its costs, it is not to be supposed that Congress meant to impose such a controlling differentiation.

To support its decision, the court below relied upon language contained in the Regulations issued under the Act. (Treasury Regulations 90, Art. 205, Appendix, *infra.*) It is true that they contain some of the generally accredited determi-

nants frequently found in tort cases. *Texas Co.* v. *Higgins,* 118 F. (2d) 636, 639 (C. C. A. 2). But the Regulations, taken as a whole, do not support the narrow view given to them by the court.

The Government does not contend that the term "employee" has some entirely new and different meaning previously unknown to the law, including the law of torts. Persons who are obviously employees fall within general rules as well as do independent contractors. These employment relationships constitute what may be termed the well-defined areas of the law of master and servant. It is these areas which the Regulations purport to cover, for they preface their statements concerning both "employee" and "independent contractor" with the words "generally" or "in general." The Regulations, like the statute itself, do not list industrial homeworkers as independent contractors or as outside the scope of the employment relationship. In illustrating the class of independent contractors, the Regulations refer to "physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public." The individuals in the present case are not characterized by a similar latitude of professional judgment or by a similar maintenance of an independent estab-

lishment. Petitioner was not a customer or client of the homeworkers; on the contrary, the latter are more naturally regarded as her employees, if the term, as stated in the Regulations, is to be given its "ordinary meaning."

3. While the legal test laid down by the court below is our primary concern in seeking review, it may be added that even if the so-called common law tests be applied, the homeworkers should have been held to be employees rather than independent contractors. In our view, the amount of control exercised by the taxpayer over them requires this conclusion. Cf. *Singer Manufacturing Co.* v. *Rahn*, 132 U. S. 518. The court below seems to have given undue weight to the fact that, as persons not working on the taxpayer's premises, the homeworkers' activities were not controlled to the same extent as are those of inside workers.[6] But where the nature of the work is such that no detailed supervision is required many courts have held that a lack of such supervision is of no significance and does not convert one who otherwise is an employee into an independent contractor.[7] There still remained in the taxpayer that right of control over the worker which stems

[6] But see the testimony of Mrs. Rhodes who worked both in the studio and in her home (R. 78–84).

[7] *Allied Mutuals Liability Co.* v. *DeJong*, 209 App. Div. 505, 205 N. Y. S. 165, 167; *Andrews* v. *Commodore Knitting Mills*, 257 App. Div. 515, 13 N. Y. S. (2d) 577; *Allaby* v. *Industrial Comm.*, 200 Wis. 611, 614; *Fischer* v. *Industrial*

from the right of discharge if any direction given is not obeyed. Cf. *Messmer* v. *Bell & Coggeshall Co.*, 133 Ky. 19, 25; 1 Thompson, *Negligence* (2d Ed.) 579. In the final analysis that is the only right of control which any employer has over his employee. Here, the dismissal may be characterized as a refusal to furnish work (R. 41–42) but it remains nothing less than the ordinary discharge of an employee. Cf. *Peasley* v. *Murphy*, 381 Ill. 187; *Schomp* v. *Fuller Brush Co.*, 124 N. J. L. 487. In short, even under the common law, the homeworkers' type of work, form of compensation, and relationship to the public, had no similarity to that of a lawyer, physician, engineer, construction contractor, broker, or businessman whose relationship with his clients or customers is traditionally characterized by a genuine independence from detailed control and supervision distinguishing the independent contractor from the employee. *Glielmi* v. *Netherland Dairy Co.*, 254 N. Y. 60.

Commission, 301 Ill. 621, 629; *Linnehan* v. *Rollins*, 137 Mass. 123; *Arkansas Power & Light Co.* v. *Richenback*, 196 Ark. 620; *Begovac* v. *Northwestern Cooperage & Lumber Co.*, 264 Mich. 508; *Kehrer* v. *Industrial Commission*, 365 Ill. 378; *Bradley* v. *Republic Creosoting Co.*, 281 Mich. 177; *Reigel* v. *J. B. Finch Timber Co.*, 182 Minn. 289; *Jones* v. *Goodson*, 121 F. (2d) 176 (C. C. A. 10); *Pure Baking Co.* v. *Early* (E. D. Va), decided April 24, 1943 (C. C. H. Unemployment Insurance Service, Vol. 1, par. 9062); *Liberatore* v. *Friedman*, 224 N. Y. 710, affirming 185 App. Div. 900 without opinion; *Buell & Co.* v. *Donaher*, 127 Conn. 606; *Fleming* v. *G & C Novelty Shoppe*, 35 F. Supp. 829 (N. D. Ill.).

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

JULY 1944.

APPENDIX

Social Security Act, Title IX, c. 531, 49 Stat. 620: [8]

SECTION 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

* * * * *

SEC. 907. When used in this title—

* * * * *

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

(4) Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;

[8] The sections quoted are the same in all material respects as Sections 1600 and 1607 (c) of the Internal Revenue Code, effective January 1, 1939. 53 Stat. 183, 187.

(5) Service performed in the employ of the United States Government or of an instrumentality of the United States;

(6) Service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions;

(7) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

* * * * *

Treasury Regulations 90, promulgated under Title IX of the Social Security Act:

ART. 205. *Employed individuals.*—An individual is in the employ of another within the meaning of the Act if he performs services in an employment as defined in section 907 (c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act.

The words "employ," "employer," and "employee," as used in this article, are to be taken in their ordinary meaning. An employer, however, may be an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an associa-

tion, or a syndicate, group, pool, joint venture, or other unincorporated organization, group, or entity. An employer may be a person acting in a fiduciary capacity or on behalf of another, such as a guardian, committee, trustee, executor or administrator, trustee in bankruptcy, receiver, assignee for the benefit of creditors, or conservator.

Whether the relationship of employer and employee exists, will in doubtful cases be determined upon an examination of the particular facts of each case.

Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

An officer of a corporation is an employee of the corporation, but a director, as such, is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

U. S. GOVERNMENT PRINTING OFFICE: 1944

(35)

No. 238.

IN THE

Supreme Court of the United States

October Term, 1944.

SELDON R. GLENN, Collector of Internal Revenue, - - - - - - - - Petitioner,

versus

ELEANOR BEARD, - - - - - Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

ALLEN P. DODD, SR.,
Louisville, Ky.,
Attorney for Respondent.

DODD & DODD,
515 M. E. Taylor Bldg.,
Louisville, Ky.,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

IN THE

Supreme Court of the United States

October Term, 1944.

No. 238.

SELDON R. GLENN, COLLECTOR OF INTERNAL REVENUE, - - - - - - *Petitioner,*

v.

ELEANOR BEARD, - - - - - - *Respondent.*

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent respectfully submits that the prayer of the petitioner for the issuance of a writ of certiorari should not be granted.

STATEMENT.

The respondent, Eleanor Beard, was engaged, and had been engaged since 1921, in the business of producing comforters, quilts and similar articles which were made by hand. These articles were produced in Hardin and Breckinridge counties, Kentucky. She

conducted a studio at Hardinsburg in Breckinridge County, Kentucky. The persons claimed to be her employees in this proceeding and who did the hand work on contract with the respondent lived in the above counties, on farms in the main, and were the wives and daughters of farmers. They are referred to in the Findings of Fact as "homeworkers." The reason for this is because they did the work in their own homes (R. 103-106). There were approximately a little over one thousand women doing such homework within the above community, of which approximately three hundred did this work for respondent. Several concerns were producing in competition with the respondent similar articles, viz., Kentucky Cottage Industries, American Needlecrafts, Inc., M. Gilanti, Mrs. Lottie Wilson and Regina. The homework was done for all of these firms and individuals more or less in the same way (R. 106). The homeworker had the right to, and generally did, accept work from the respondent and a competing studio at the same time, and have in her home work from two or more of the above firms (R. 107).

These women, referred to as homeworkers, had their usual farm duties to perform, such as keeping house, cooking the meals, raising the children, canning, hog killing, and assisting sick neighbors. They did not work steadily throughout the year and would not accept the work at certain periods when their farm duties did not leave time to do such work. They did the work at odd times when they were not otherwise

employed with their farm duties and at night after the evening meal (R. 106).

> "There was no requirement on the part of the plaintiff that a homeworker should work exclusively for her, either over any stated period of time or during any period of time when she was working for the plaintiff. There was no requirement that homeworker take and complete any certain amount of work, the amount being taken by the homeworker being determined by what she was willing to take and wanted to take and could be returned in a reasonable time. It was not necessary for a homeworker to call in person at the studio to get the work, and one homeworker would frequently go to the studio and get bundles for both herself and other homeworkers living in the same general locality to whom she would distribute the bundles after returning to her own home. The homeworker who received the bundle at the studio signed the contract in her own name and was responsible for the return of the work according to the agreement with the studio. In many instances the studio did not know, and never advised, as to which homeworkers actually received the different bundles and performed the work. In some instances the work was sent to homeworkers by mail." (R. 107.)

Respondent did not exercise any control or supervision over the homeworkers or over the work while it was being done. It was left entirely to the judgment and wishes of each homeworker as to the number of days or hours in any week or month she would devote

to the work. She could start work at any time of the day or stop work at any time she desired. She could work for a short period of time at different intervals during the day if she wished, or she could refrain from working at all on any particular day she preferred not to work. No employee of the respondent visited the homeworker to inspect the progress or quality of the work or to supervise the doing of the work while it was being done. The only right the respondent exercised was the right of inspection of the results, and if found to meet the design or specifications the homeworker was paid the contract price (R. 108).

The method of contracting indulged in by respondent was substantially as follows:

A design for an article was determined upon by the respondent, which was stamped upon the material to be used, and specifications dealing with the work to be performed were decided upon. The article was then taken to the receiving room, where material and thread were wrapped with it. The specifications or instructions were placed upon a work-ticket attached to the bundle. The bundle was then delivered to a homeworker who wished to do the work, and who took the bundle from the studio to her home. The respondent furnished no tools, or even needles, to the homeworker, who was required to furnish her own frame, needle, thimble and any home-made stand for supporting or suspending the article. At the time of the delivery of the bundle to the homeworker, a contract was executed, the form of which is set out in the Record (R. 103-104). A signed copy of the contract was given to the home-

worker and one was retained by respondent. The price to be paid for the completed article was originally fixed by the homeworker, and if in the opinion of the homeworker it developed that it was not enough, the homeworker discussed the matter with the respondent and a price agreed upon satisfactory to both parties. Thereafter prices were fixed by comparison with the prices previously paid for similar work, with more difficult designs getting higher prices and with adjustments being made with the homeworker when the work proved more difficult than expected. If the price paid by the respondent for the work on any given article was not satisfactory to the homeworker, she did not take that particular work, but took such other work as was agreeable to her. Each homeworker controlled the time in which the work was to be completed by an estimate made at the time the work was received. When the work on the particular article was completed by the homeworker, it was returned by her to the studio, where it was inspected, and if it complied with the specifications, the contract price was paid. If the work was not in accordance with the specifications, it was rejected. The homeworker was usually offered an opportunity to do the work over, but as a practice did not do it. For rejected work she received no compensation. The article thus produced is highly artistic and sold exclusively to the luxury trade (R. 105-106).

The District Court concluded as a matter of law that the homeworkers were independent contractors, and, therefore, exempt from the provisions of the Act in question (R. 111).

THE QUESTION PRESENTED.

The only question that was ever presented, either in the District Court or Circuit Court of Appeals, was whether these individuals were employees within the meaning of the provisions of the Social Security Act (Title IX, C. 531, 49 Stat. 620, Sections 901-907).

REASONS ASSIGNED AS SUPPORTING THE PETITION.

The basis for the writ, generally speaking, may be covered by the following propositions:

(a) That the decision involves an important federal question;

(b) That much confusion has arisen in the enforcement of the Act in question by the Commissioner, resulting in many thousands of cases involving many thousands of individuals, which requires a decision in order to clarify the situation existing within the office of the Commissioner.

ARGUMENT.

No doubt, from the expressions used in the petition as well as the data furnished, there is much confusion in the office of the collectors throughout the United States as to whether, in a given situation, an individual is an employee or independent contractor. At the outset, and after the Acts in question were adopted by the Congress, the Commissioner adopted certain regu-

lations interpreting the Acts and as a guide for the enforcement thereof. Among them is Treasury Regulation 90, found quoted at page 24 of the appendix to the petition. Paragraph (c) of that regulation, among other things, provides:

> "However, the relationship between the individuals who perform such services and the person for whom such services are rendered must, as to those services, *be the legal relationship of employer and employee.*" (Italics ours.)

And again:

> "The words, 'employ,' 'employer' and 'employee,' as used in this article, are to be taken in their ordinary meaning."

And further:

> "In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee."

We believe that this regulation as a whole fairly interprets the acts in question, and certainly, under the regulations, before an individual can be brought within the terms of the Act for social security purposes, "the legal relationship of employer and employee" must be established.

With this regulation interpreting the acts in accordance with their terms, and fairly so, the action of the

Commissioner, as in this case, in attempting to get away from his own interpretation of the Act in the first instance has been the primary cause, in our opinion, for the confusion that exists and as pointed out in the petition.

Uniformly, when the question of the meaning of this Act has been involved in social security cases, the district courts and the various Circuit Courts of Appeals, where the cases have been decided, have interpreted the Act exactly as the Commissioner did when he promulgated Regulation 90. See *Indian Refining Company* v. *Dallman,* 31 Fed. Supp. 455; *Texas Company* v. *Higgins,* 118 F. (2d) 636; *Walling* v. *Sanders,* 136 F. (2d) 78. Likewise, the Court of Appeals of Kentucky, as well as the courts of last resort of other States, have construed similar acts of the States the same way. See *Barnes* v. *Indian Refining Co.,* 280 Ky. 811; *Texas Company* v. *Bryant,* (Tenn.) 152 S. W. (2d) 627. In the present case the District Court and the Sixth Circuit Court of Appeals did likewise, so that the confusion and congested condition of the offices of the various collectors has arisen due to the position taken by the Commissioner and various collectors, which runs counter to the very regulation adopted in the first instance. In other words, the Commissioner has presented the situation that exists and not the taxpayer.

We have no quarrel with the principles announced by this Court in the cases of *United States* v. *American Trucking Ass'ns,* 310 U. S. 534; *South Chicago Company* v. *Bassett,* 309 U. S. 251, 259; *Drivers' Union* v.

Lake Valley Co., 311 U. S. 91; *National Labor Relations Board* v. *Hearst Publications*, decided April 24, 1944; *Tennessee Coal Company* v. *Muscoda Local*, 321 U. S. 590, 597. Nor have we any quarrel with the language quoted in the petition from the last above-mentioned case, and we agree with the principle that the statute "must be read in the light of the mischief to be corrected and the end to be attained." In other words, the question in any given case as to whether a person is an employee or independent contractor turns upon the facts in the particular case, and the language of the particular Act sought to be applied.

The language in the Tennessee Coal Company case, *supra*,

> "the word 'employed' * * * must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. * * * Such statutes * * * should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them,"

involves the principles that we believe the District Court followed in the decision of this case, which was affirmed by the Circuit Court of Appeals.

Turning back to the facts, it will be observed that these homeworkers were protected from every standpoint in the making of these contracts, in so far as control and pay were concerned. They fixed the price for the given article and fixed the time within which it should be performed. They were not required to work

for anyone exclusively, and the very business itself furnished the competition as among the various industries that guaranteed liberty of action on the part of the homeworkers. No fact or circumstance contained in the record is pointed out in the petition or argued here to be within the principles quoted above, except the fact that if a homeworker was incapable of performing the contract she was not given more work. If she was incompetent and failed in the performance of her contract, she was not only not paid for the work that she had so improperly performed, but was not given additional work. We have searched the authorities to find a case supporting the proposition that these facts constituted any evidence that the person involved was an employee. The contrary is true. To adopt the language quoted *supra* from Regulation 90:

> "If an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee."

All that the rejection of the work and the refusal to give other work by reason of incompetence proves is the right to control the result, and in the promulgation of Regulation 90 the entire tax collecting department of the United States merely followed the rule that respondent sought to have enforced and that was enforced by the courts here.

While this Court, in so far as the writers of this brief are advised, has never construed the Social Se-

curity Act as to the question here involved, it has construed the Railroad Employees' Liability Act involving similar language. We refer to Mr. Justice Hughes' opinion in *Robinson* v. *Baltimore & Ohio Railroad Company,* 237 U. S. 84, 59 L. Ed. 849, wherein Mr. Justice Hughes said:

> "We are of the opinion that congress used the words 'employee' and 'employed' in the statute in their natural sense and intended to describe the conventional relation of employer and employee."

See, also, *Wells-Fargo Co.* v. *Taylor,* 254 U. S. 175, 65 L. Ed. 205; *Chicago, Rock Island & Pacific R. R. Co.* v. *Bond,* 240 U. S. 449, 60 L. Ed. 735.

CONCLUSION.

In conclusion, we desire to call the Court's attention to some very practical questions that are involved in this proceeding. It is to be noticed in the Findings of Fact that the respondent never knows who performs the work, and there is no way for her to know who actually performs the work on these bundles. As the Court points out, the work is done by the wives and daughters of farmers who come from their homes in the country to this village and procure bundles. All of the ladies in the household work at odd times on these bundles. Indeed, the husbands and fathers many times call for the bundles, and the only record that the respondent could have as to who takes out the bundles are the ones who call and sign the contracts. In

other words, Mrs. Smith may sign six separate contracts for six separate bundles, all of them in her own name and return those bundles and collect the contract price. Mrs. Smith's daughters and her neighbors may, and do, frequently perform this work. Due to travel and dirt roads, an individual in a community at a distance from Hardinsburg would drive in to the studio, collect bundles for all of the neighbors and in turn parcel them out as she has a right to do under the contract, then collect up the bundles, deliver them to the studio and collect the contract price. In many instances the husbands of these individuals will collect the bundles for a community, return them, collect the contract price and perform no part of the work, he distributing the money to the various homeworkers. There is no way for the respondent to know who actually performs the work, and the record fails to disclose that fact, but the records of the respondent disclose the names of the persons to whom she paid the contract price, and the funds collected from the respondent and involved here could not be credited to any one other than the person who received the money and not to the person who did the work.

The very funds involved in this proceeding were collected by the petitioner from the respondent under the conditions set forth above, and if they are credited for social security purposes to the individuals who received the money, as they must be or the funds retained, then the actual homeworker obtains no benefit from social security, even though she performs the work and ultimately get the money. We know that the con-

fusion in the office of the Commissioner with reference to these homeworkers does exist, because this respondent could not, on request, advise the Commissioner actually who earned the money.

While there may be 77,000 homeworkers in the United States who perform work for industries as set forth in the notes to the petition, the individuals involved in this particular business are the number set forth in the Findings of Fact, or approximately 300 women. None of these statistics quoted so elaborately in the petition show that the particular character of work done here is performed anywhere outside of the above locality. The respondent was the originator of this work, and it is interesting to note that she started out with three women who were capable of doing it (R. 22). From 1921 to the present time, through experience and education, the number has grown to approximately 1,000, as we have pointed out above, and likewise competition has arisen to the point where there are four or five firms and individuals competing in the field, which makes it easy for the homeworker to procure a fair return for her work and be at complete liberty as to whether she will or will not do work for any one of the other of these firms and corporations. The fact that they all contract the same way is evidence that the way the work is done is the only way it can be done. In other words, this proceeding could not settle any great public question involving any more than those individuals living on farms in Breckinridge and adjoining counties in Kentucky.

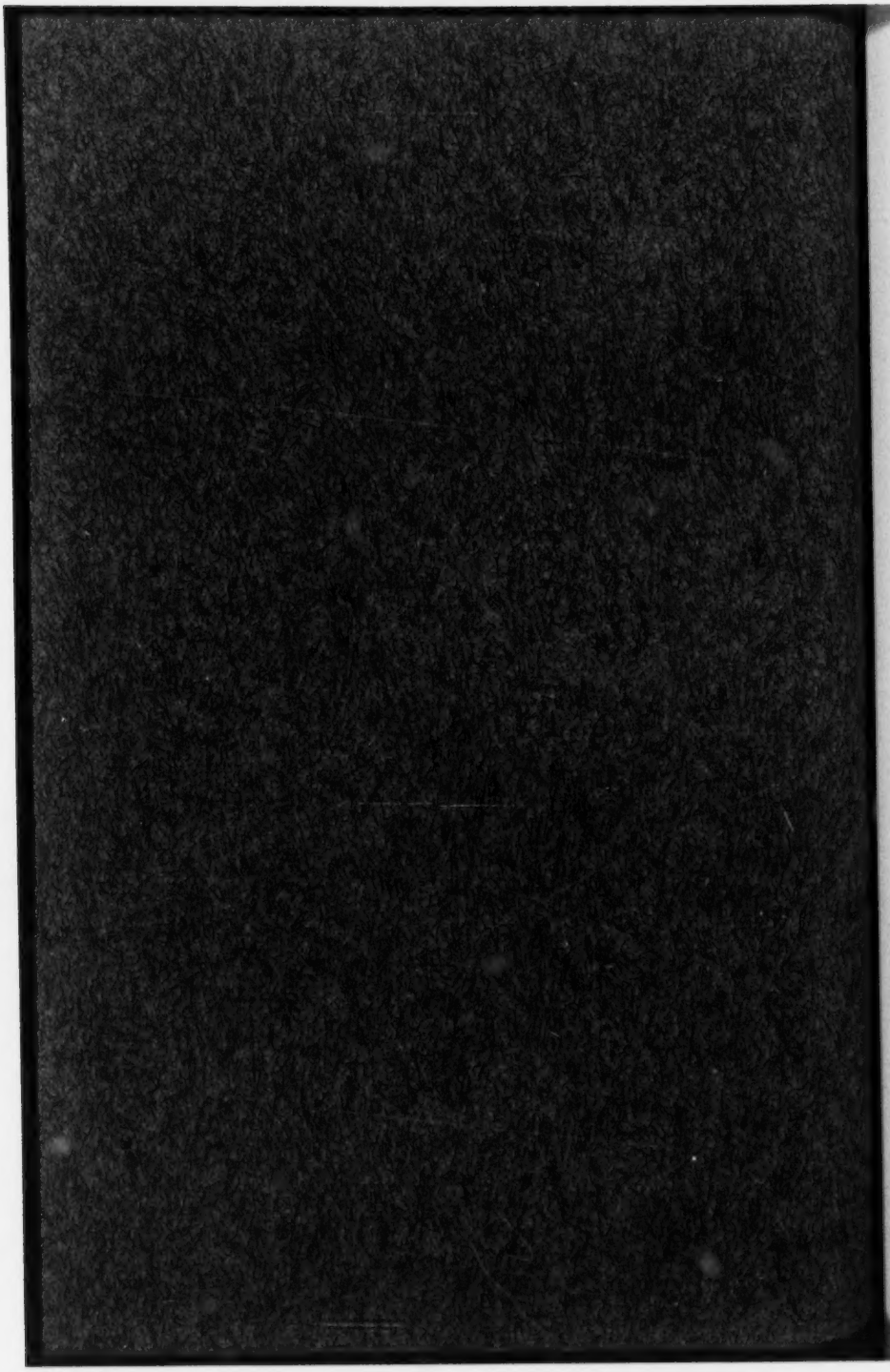
Therefore, for all practical intents and purposes, this case involves a particular locality in the United States and no more than 1,000 individuals in that locality. There is no way for the petitioner or any authority of the Government to properly or correctly allocate the funds to the individuals who actually do the work, and due to no fault of the respondent that either actually exists or that is pointed out in the petition.

For the foregoing reasons, we respectfully submit that the case was correctly decided below and that there is no basis on which the petition can be sustained. Accordingly, it should be denied.

Respectfully submitted,

ALLEN P. DODD, SR.,
Louisville, Ky.,
Attorney for Respondent.

DODD & DODD,
515 M. E. Taylor Bldg.,
Louisville, Ky.,
Of Counsel.



INDEX

CITATIONS

633994—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 238

SELDON R. GLENN, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

ELEANOR BEARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF PETITIONER FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Comes now the petitioner, Seldon R. Glenn, Collector of Internal Revenue, by the Solicitor General, and respectfully prays leave to file the attached petition for rehearing in this case.

CHARLES FAHY,
Solicitor General.

PETITION FOR REHEARING

Comes now the petitioner in the above cause, Seldon R. Glenn, Collector of Internal Revenue, by the Solicitor General, and respectfully prays that his petition for a writ of certiorari which was filed on July 7, 1944, and denied on October 9,

1944, be reconsidered and that the writ then sought to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered on March 20, 1944, be now issued.[1]

REASONS FOR ALLOWING THE PETITION FOR REHEARING AND GRANTING THE WRIT

1. When the petition for a writ of certiorari which the Court is asked to reconsider was presented it was pointed out that the decision below appeared to be erroneous in that its rationale seemed to bear no relationship to the nature or purposes of the Social Security Act; that the question was a fundamental one; and that until set at rest by the authority of a decision of this Court the question would present formidable difficulties in the proper administration of the law. All these considerations remain substantially unchanged.[2]

[1] Following this Court's action in denying the original petition for certiorari the amount of the judgment was paid by the petitioner to the respondent, and on February 19, 1945, a formal order reflecting the fact of such payment was entered in the district court at the instance of the respondent. However, we believe it clear that payment of a money judgment does not preclude the judgment debtor from pursuing appropriate proceedings to secure reversal of the judgment and recovery of the money paid. *Dakota County* v. *Glidden*, 113 U. S. 222, 224; *O'Hara* v. *McConnell*, 93 U. S. 150, 154; *Josevig-Kennecott Copper Co.* v. *James F. Howarth Co.*, 261 Fed. 567.

[2] After the Court's denial of certiorari, the Bureau of Internal Revenue, in an effort to adjust its position to the realities of the situation, issued a ruling accepting the decision as controlling in all cases involving substantially the same cir-

2. On November 13, 1944, the Circuit Court of Appeals for the Fourth Circuit rendered a decision in *United States* v. *Vogue, Inc.*, 145 F. 2d 609 (C. C. A. 4th), which is in substantial conflict with the decision of the court below in the instant case.

Factually the two cases are unlike in some respects. But the dissimilarities do not serve to avoid the conflict since it is one which involves opposing principles which, if applied to the same facts, would lead to different results.

Historically the conflict traces its genesis to a decision of the court below which arose under the Fair Labor Standards Act. *Walling* v. *American Needlecrafts*, 139 F. 2d 60 (C. C. A. 6th). In that case an employer was contending that it was not liable for non-compliance with the wage

---

cumstances. Mim. 5763, 1944–22 Int. Rev. Bull. 40–41. Since the facts—as to the crucial question of control over actual performance of the work—are reasonably typical of any homeworker case, the ruling is virtually equivalent to a holding that no homeworker is entitled to the coverage of the Act. On its face, a ruling of such broad import might appear to eliminate, so far as homeworkers are concerned, the administrative difficulties which result from doubt as to the scope of the Act. But such is not the case, since a ruling favorable to the employer under the taxing provisions of the Act is unfavorable to his workers under the benefit provisions, and at the same time is not binding on the latter. Thus, the administrative problems are not disposed of by conceding the employers' claims, but are merely shifted from the Treasury to the Social Security Board. Cf. *Carroll* v. *Social Security Board*, 128 F. 2d 876 (C. C. A. 7th); *LaLone* v. *United States*, 57 F. Supp. 947 (E. D. Wash.).

and hour provisions of the Act in connection with its employment of homeworkers because such persons were not "employees" within the common law concept of the term, as exemplified by the so-called "control test." The court rejected the contention. Rather, it held, in substance, that the Fair Labor Standards Act was one of a class of regulatory and remedial statutes designed to implement a public social or economic policy unknown to the common law, and that taken as a whole the language, purposes and history of the Act indicated that Congress did not intend to lend its encouragement to a return of the sweat shop system by permitting employers to take advantage of supposed and irrelevant common law distinctions between home and factory workers as a basis for shedding the economic and social responsibilities which prompted the legislation.

Because the *Needlecrafts* case and the present case are indistinguishable on their facts[3] and issues, and because the Social Security Act was intended to implement the same Congressional policy which supported the rationale of the *Needlecrafts* case, the Government considered it controlling in the present case and so urged in the

[3] When the case was argued orally the court below stated that it was of the impression that the facts in the *Beard* and *Needlecrafts* cases were alike. When it was agreed by opposing counsel that such was the case, the court asked Government counsel to refrain from making a statement of the facts in the present case since the court was familiar with the facts of the *Needlecrafts* case.

court below. See also, *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111. The court, however, refused to follow the *Needlecrafts* case, but accepted instead the precise contentions which it previously had rejected. To support the change in its position, the court, while referring to certain aspects of the language and legislative history of the Fair Labor Standards Act which it found lacking with respect to the Social Security Act, distinguished the cases primarily on the basis of its understanding of the Treasury Regulations issued in connection with the latter Act. From these Regulations it concluded that the so-called "common law control test" furnished the proper basis for decision. The court pointed to nothing in the language, purposes or history of the Social Security Act which would have precluded the application of the principles of the *Needlecrafts* decision.

After the decision below, and after this Court's decision in the *Hearst* case, the question arose in the Circuit Court of Appeals for the Fourth Circuit. *United States* v. *Vogue, Inc., supra.* There, again, the Government relied upon the principles of the *Needlecrafts* decision, supported by the similar principles of the *Hearst* decision, and the taxpayer, again, relied upon the common law "control test" of the decision below. Although the case arose under the Social Security Act and the language, history and regulations which the court below had thought controlling in this case were unchanged, the Circuit Court

of Appeals for the Fourth Circuit expressly refused to rest its decision on the *Beard* rationale but applied the opposing principles of the *Hearst* and *Needlecrafts* decisions. See also, *LaLone* v. *United States, supra; Nevins, Inc.* v. *Rothensies* (E. D. Pa.), decided January 5, 1945 (1 C. C. H. Unemployment Service, par. 9167).

Thus, since the conflicting results of the *Needlecrafts* and *Beard* cases can be reconciled only on the basis of statutory distinctions—which distinctions do not exist between the *Beard* and *Vogue* cases—the acceptance of the *Needlecrafts* decision by the Circuit Court of Appeals for the Fourth Circuit makes it clear that that court, if faced with the facts here involved, would reach a result contrary to that reached by the court below.

Rehearing is therefore sought not only because we believe that the question remains fundamentally an important one but in the hope that this Court may resolve the conflict now existing between the circuits.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

I certify that this petition is presented in good faith and not for delay.

CHARLES FAHY,
Solicitor General.

MARCH 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945

(37)

No. 238.

IN THE

Supreme Court of the United States

October Term, 1944.

SELDEN R. GLENN, Collector of Internal Revenue, - - - - - - - - - Petitioner,

versus

ELEANOR BEARD.

BRIEF IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND IN OPPOSITION TO THE PETITION FOR REHEARING.

ALLEN P. DODD,
Attorney for Respondent.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

IN THE

Supreme Court of the United States

October Term, 1944.

No. 238.

SELDON R. GLENN, COLLECTOR OF INTERNAL REVENUE, - - - - - - - - - *Petitioner,*

v.

ELEANOR BEARD.

BRIEF IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND IN OPPOSITION TO THE PETITION FOR REHEARING.

The above case makes its appearance again in this Court on the same record. The petition for writ of certiorari was filed July 7, 1944, and denied October 9th following. On February 19, 1945, the judgment appealed from, together with interest and taxable cost, was paid.

The motion for leave to file the petition for rehearing was served on counsel for respondent on the 19th of March, 1945.

It would seem that a statement of the foregoing steps, in the light of the rules of this court, ought of

itself to warrant the denial of the motion for leave to file the petition for rehearing and deny the petition.

There is no statement made in the petition or in the motion that takes this case out of the rules of this court, as we see and understand those rules. Rule 33 of the rules of this court provides:

> "A petition for rehearing may be filed with the clerk, in term time or in vacation, within twenty-five days after judgment is entered, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session; and must be printed, briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment desires it, and a majority of the court so determines."

For the foregoing reasons, the respondent respectfully objects to the motion for leave and asks that it be overruled.

THE PETITION.

The only fact set forth in the petition for rehearing that was not covered by the petition for writ of certiorari is one of event. It happened that the Circuit Court of Appeals for the Fourth Circuit, on November 13, 1944, decided *U. S.* v. *Vogue, Inc.*, 145 F. (2d) 609, and it is now claimed that the opinion in that case is in conflict with the opinion of the Sixth Circuit

Court of Appeals in this case. It is admitted in the petition that there is a factual difference between the two cases, and we submit that upon the record in the Vogue case there is quite a wide distinction between those facts and the record in this case, even if the opinion in the Vogue case could be used at all in this case.

Mr. Justice Parker, who delivered the opinion in the Vogue case, after stating the facts, held:

> "On the above facts, we think it perfectly clear that Mrs. Fulton and Mrs. Woodfin were not independent contractors, but employees within any fair meaning of that term and certainly within the meaning of the Social Security Act."

In other words, that case turned upon the question as to whether the facts warranted a finding that the individuals involved were or were not independent contractors. The facts briefly summarized by Mr. Justice Parker clearly distinguish that case from this case, for he said:

> "They were engaged in work which was an important part of the work of plaintiff's store; they occupied premises over which plaintiff exercised control; they were subject to call by plaintiff; they did work which plaintiff gave them to do; they were paid for their work by plaintiff; and when they worked for a weekly wage and were unquestionably subject to plaintiff's orders they handled the work in precisely the same way as when working on the piece work basis."

The homeworkers in this case, and at the times they were contracting with the respondent, were contracting with seven other industries, and

(a) They didn't occupy premises over which respondent exercised control;

(b) They were not subject to call by respondent;

(c) Each piece of work was by special contract, and such as they were willing to take;

(d) They were paid in accordance with the contract;

(e) They never worked for a weekly wage at any time for respondent; and

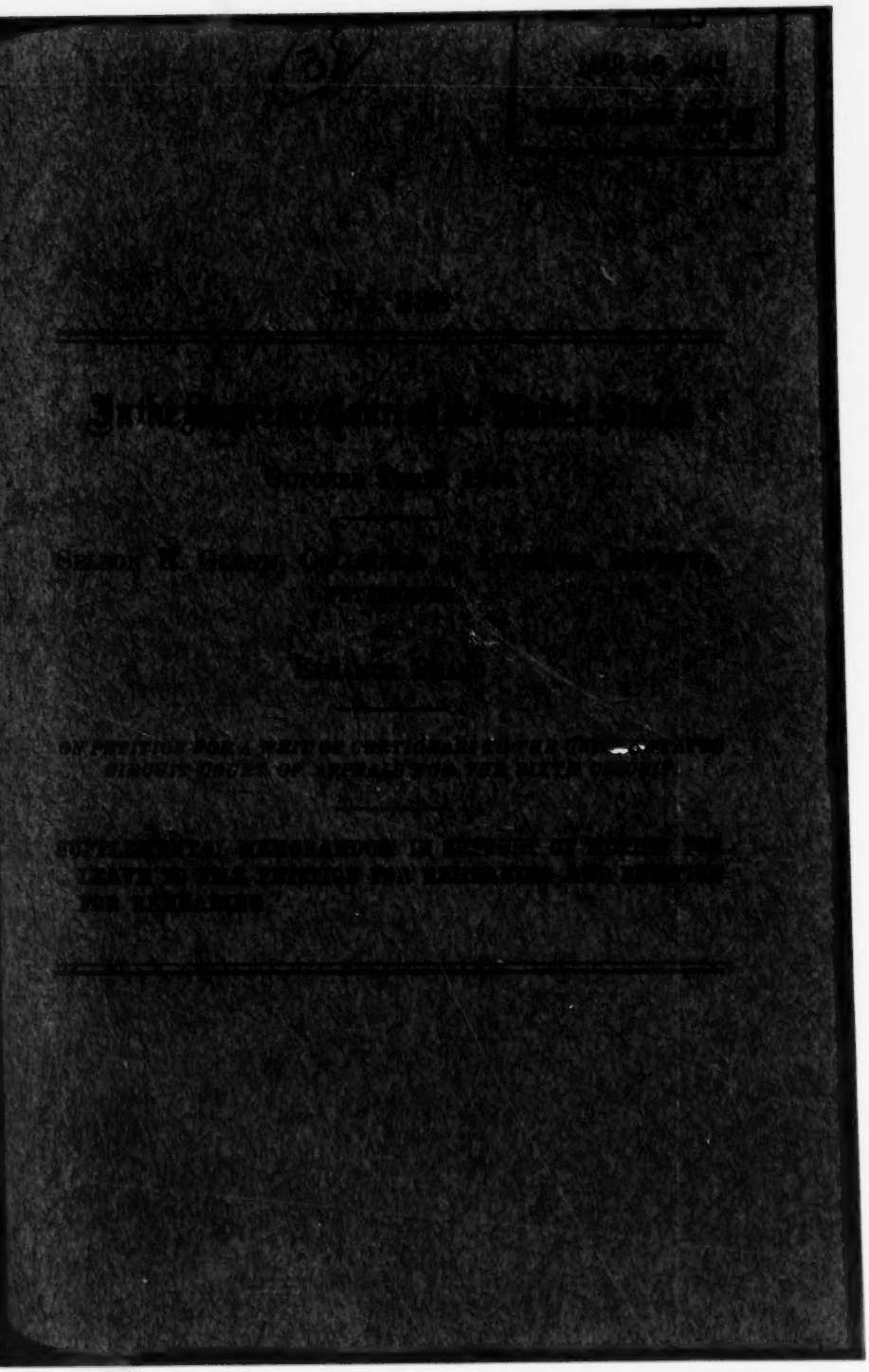
(f) Contracts were not awarded by custom.

There are many other features disclosed by this record that distinguish this case from the Vogue case, *supra.*

We submit that there was no basis for the writ of certiorari and certainly this petition for rehearing adds nothing of merit to the original petition, and accordingly is without merit.

Respectfully submitted,

ALLEN P. DODD,
Attorney for Respondent.



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 238

SELDON R. GLENN, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

ELEANOR BEARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING

Since the filing of the petitioner's motion for leave to file petition for rehearing, the Court of Appeals for the District of Columbia has passed upon the question here involved. *Raymond J. Grace* v. *Magruder,* decided March 19, 1945, not yet reported. A copy of the opinion is annexed.

As was shown in our petition for rehearing, the decision in *United States* v. *Vogue, Inc.,* 145 F. 2d 609 (C. C. A. 4th), was based upon principles of law which are in such conflict with the principles which supply

637090—45

the rule of decision below as to require contrary results upon the same facts. See also, *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111. The decision in the *Grace* case is based upon precisely the same principles as those of the *Vogue* case. Again the decision of the court below in *Walling* v. *American Needlecrafts,* 139 F. 2d 60—rather than its decision in the instant case—was accepted as representing the proper rule for application in cases involving the meaning of the term "employee", as used in legislation of this class.

The conflict which existed between the law of the Sixth Circuit and that of the Fourth Circuit is now extended to include the District of Columbia.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

MARCH, 1945.